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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 395

In the Matter of the Application

—of—

RICHARD PERRY LOVING and MILDRED DELORES JETER LOVING

## JURISDICTIONAL STATEMENT

BERNARD S. COHEN
PHILIP J. HIRSCHKOP
LAINOF, COHEN & COHEN, ESQS.
1513 King Street
Alexandria, Virginia
*Attorneys for Appellants*

MELVIN L. WULF
156 Fifth Avenue
New York, New York

DAVID CARLINER
1424 16th Street, N.W.
Suite 501
Washington, D. C.
*Of Counsel*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

RICHARD PERRY LOVING and MILDRED DELORES JETER LOVING,

*Appellants,*

—v.—

COMMONWEALTH OF VIRGINIA,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF VIRGINIA

## JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Appeals of Virginia of March 7, 1966, affirming the decision of the Circuit Court of Caroline County entered on January 22, 1965, which denied the appellants' Motion to Vacate Judgment and Set Aside Sentence and affirmed the judgment of conviction originally entered by the Circuit Court of Caroline County on January 6, 1959. Appellants submit this statement to show that this Court has jurisdiction of the appeal and that substantial federal questions are presented.

## Citation to Opinion Below

The Judgment Order entered by the Circuit Court of Caroline County, Virginia on January 22, 1965, was accompanied by a written opinion (R-8). That opinion, which is not officially reported, is set out in the Appendix, *infra*, pp. 33-42. The opinion of the Supreme Court of Appeals of Virginia is reported at 206 Va. 924, 147 S. E. 2d 78 (1966) (R-19) and is set out in the Appendix, *infra*, pp. 21-30.

## Jurisdiction

Appellants were convicted in the Circuit Court of Caroline County, Virginia, on January 6, 1959, of violating Virginia's anti-miscegenation statutes. Va. Code §§ 20-50 through 20-60 (1950). While neither the informations nor grand jury indictments refer to specific sections of the Virginia Code they incorporate language from Va. Code § 20-58 which is entitled "Leaving State to evade law." Appellants filed a Motion to Vacate Judgment and Set Aside Sentence on November 6, 1963 (R-6). The Circuit Court of Caroline County issued its written opinion and order on January 22, 1965 (R-8).

Appellants filed their Notice of Appeal and Assignments of Error on March 2, 1965 (R-15) and their Petition for a Writ of Error and Supersedeas in the Supreme Court of Appeals of Virginia on May 17, 1965. The Writ of Error and Supersedeas was granted by the Supreme Court of Appeals of Virginia, at Richmond, on June 11, 1965 (R-1). On March 7, 1966 the Supreme Court of Appeals of Virginia affirmed the convictions of the appellants, set aside their

sentences, and remanded for further sentencing not inconsistent with the opinion (R-33). On March 28, 1966, the Supreme Court of Appeals of Virginia issued an Order staying execution of its judgment of March 7, 1966, in order that the appellants "may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for appeal to review the judgment of this Court" (R-36).

The notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Appeals of Virginia on May 31, 1966 (R-37).

Jurisdiction of this Court on appeal rests upon 28 U. S. C. § 1257 (2). *Williams* v. *Bruffy*, 96 U. S. 176 (1877); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965).

## Constitutional and Statutory Provisions Involved

1. Petitioners were convicted of violating Va. Code § 20-58 (1950) (Vol. 4, p. 491), which provides:

> § 20-58. Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage. (Code 1919, §§ 4540, 5089.)

2. The case also specifically involves Va. Code § 20-54 (1950) (Vol. 4, p. 489), which provides:

> § 20-54. Intermarriage prohibited; meaning of term 'white persons.'—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter. (1924, p. 535; Michie Code 1942, § 5099a.)

3. The case also specifically involves Va. Code § 20-59 (1950) (Vol. 4, p. 492), which provides:

> § 20-59. Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years. (Code 1919, § 4546; 1932, p. 68.)

4. The case also specifically involves Va. Code § 1-14 (Supp. 1964) (Vol. 1, p. 12), which provides:

> § 1-14. Colored persons and Indians defined.—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth

> or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians. (Code 1919, § 67; 1930, p. 97; 1954, c. 702.)

5. This case also involves the First and Ninth Amendments, the first section of the Fourteenth Amendment to the Constitution of the United States, and 42 U. S. C. 1981, which provides:

> § 1981. Equal rights under the law.—All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. R. S. § 1977.

## Questions Presented

1. Do the Virginia anti-miscegenation laws (Va. Code §§ 20-50 et seq. (1950) and Va. Code § 1-14 (Supp. 1964)) violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

2. Does a state statute which proscribes marriage between members of different races violate the constitutional right of privacy?

3. Does a state statute which proscribes marriage between members of different races violate a constitutional right of freedom to marry?

4. Is a state law valid under our Constitution which makes the color of a person's skin the test of whether his marriage constitutes a criminal offense?

5. Do the Virginia anti-miscegenation statutes deprive the appellants of the civil rights guaranteed by Title 42 U. S. C. § 1981?

## Statement of the Case

On or about the 2nd day of June, 1958, Mildred Jeter, a "colored person," and Richard Perry Loving, a "white person," were lawfully married in the District of Columbia, pursuant to the laws of the District. Shortly after their marriage appellants returned to Virginia and established their marital abode. On the 11th day of July, 1958, warrants were issued charging appellants with attempting to evade the Virginia ban on interracial marriages. Va. Code § 20-58 (1950) (R-2). During the 1958 October Term of the Grand Jury of Caroline County, they were indicted for this offense and on January 6th, 1959, they entered a plea of guilty. The following sentence was imposed:

> The court doth accept the pleas of 'guilty' and fix the punishment of both accused at one year each in jail. The court does suspend said sentence for a period of twenty-five years upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years (R-6).

During the period from the time of their conviction until approximately the summer of 1963, the Lovings took up residence in the District of Columbia. Shortly thereafter they retained counsel who, on the 6th day of November, 1963, filed a motion in the Circuit Court of Caroline County to vacate the judgment and set aside the sentence (R-6). On October 28, 1964, a class action was filed by the appellants in the United States District Court for the Eastern District of Virginia, requesting that a three-judge

federal court be convened to declare Va. Code §§ 20-50 through 20-60 unconstitutional and to enjoin the state officials from enforcing the appellants' prior convictions. On January 22nd, 1965, Judge Bazile of the Circuit Court of Caroline County entered an Order denying appellants' prior Motion to Vacate Judgment and Set Aside the Sentence. On February 11, 1965 the three-judge federal court (Judges Bryan, Butzner and Lewis) entered an interlocutory order continuing the matter so that the appellants herein might have a reasonable time to "submit [the] issue [therein] to the state courts for final determination." Since the summer of 1963 and during the pendency of all court proceedings since that time, the Lovings have continued to reside in Virginia, safe from further arrest and prosecution only because the three-judge federal court's interlocutory order stated that:

> . . . in the event the plaintiffs [Lovings] are taken into custody in the enforcement of the said judgment and sentence, this court, under the provisions of title 28, section 1651, United States Code should grant the plaintiffs bail in a reasonable amount during the pendency of the State proceedings in the State Courts and in the Supreme Court of the United States, if and when the case should be carried there. . . .

## How the Federal Questions Were Raised and Decided

No federal questions were raised at the time the appellants were originally brought to trial in 1959. However, on November 6, 1963, counsel for appellants filed a Motion to Vacate Judgment and Set Aside Sentence in the trial court (R-6). Under Virginia law a suspended sentence remains within the jurisdiction of the trial court during the period of suspension. *Richardson* v. *Commonwealth,* 131 Va. 802, 109 S. E. 460 (1921). Such a motion was therefore timely and part of the trial court proceedings.

The following specific federal questions were raised in that motion:

> Said sentence constitutes banishment and is thus a violation of constitutional due process of law.
>
> Said sentence is improper because it is based on a statute which is unconstitutional on its face, in that it denies the defendants the equal protection of the laws and denies the right of marriage which is a fundamental right of free men, in violation of § 1 of the Virginia Constitution and the Fourteenth Amendment of the Federal Constitution.
>
> Said statute and said sentence are unconstitutional burdens upon interstate commerce (R-7).

The written opinion of the trial court dealt specifically with each of the points raised in the Motion. The trial court said, "It is next contended that these statutes are unconstitutional in violation of § 1 of the Virginia Constitution and the Fourteenth Amendment of the United States

Constitution." The Court held that "there is nothing in . . . the Fourteenth Amendment which has anything to do with this subject here under consideration" (R-11). The trial court further held that "Marriage has nothing to do with interstate commerce. There is nothing more domestic than marriage; and this contention is without merit" (R-13).

On January 22, 1965, the trial Judge entered an Order denying the Motion to Vacate Judgment and Set Aside the Sentence, for reasons stated in the written opinion quoted above (R-8).

On appeal, the assignments of error alleged that the Court erred in holding that the anti-miscegenation statutes did not violate the due process and equal protection clauses of the Fourteenth Amendment to the federal Constitution. Further error was alleged in holding that the sentence and suspension was not a violation of due process of law.

In affirming the conviction, the Supreme Court of Appeals of Virginia squarely considered the constitutionality of the anti-miscegenation statutes. The Court stated:

> The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative of the Constitution of Virginia and the Constitution of the United States. Such statutes, the defendants argue, deny them due process of law and equal protection of the law. *Loving* v. *Commonwealth,* 206 Va. 924, 926, 147 S. E. 2d 78, 80 (1966) (R-21).

The Court went on to hold that "That portion of the order appealed from upholding the constitutionality of Code,

§§ 20-58 and 20-59, and the convictions of the defendants thereunder, is affirmed . . . " (R-32).

Appellants' brief in the Supreme Court of Appeals of Virginia argued that the anti-miscegenation statutes were unconstitutional in that they denied the appellants equal protection of the laws and due process of the laws. The State's brief argued that the law was not violative of the Fourteenth Amendment.

## The Questions Presented Are Substantial

This case presents the important constitutional question of the application of the due process and equal protection clauses of the Fourteenth Amendment to anti-miscegenation statutes.

## I.

**The statutes involved are racially discriminatory and deny the appellants as individuals, and Negroes and whites as groups, the equal protection of the laws.**

There can be no doubt that the conviction of the Lovings was based on race. But for the fact that Mildred Jeter was a "colored person" under Va. Code § 1-14 and Richard Loving a "white person" under Va. Code § 20-54, no crime would have been committed. Except for the difference of color, the state never raised any objection to the marriage. If both had been white or both had been other than white, the marriage would be valid. The gravamen of the appellants' claim, that the anti-miscegenation statutes violate the due process and equal protection clauses of the Fourteenth Amendment, is that it is the color of their skin

which makes their marriage criminal. Indeed, Va. Code § 20-59 makes the act a felony punishable by confinement in the penitentiary for not less than one nor more than five years.

The legislative history of the laws involved leave no doubt that their purpose is racial discrimination. The Virginia anti-miscegenation laws date back to a 1691 resolution of the Colonial Assembly entitled "An act for the suppression of outlying slaves." Act XVI, May 19, 1691; 3 Stat. at Large, p. 86 (Henning's 1823). The substance of this legislation was re-enacted with each revision of the Code, and supplemented in 1924 by the requirement that persons register with the state for pedigrees. "An act for the preservation of racial integrity," Va. Acts of Assembly, Ch. 377, p. 534 (1924) (now Va. Code § 20-50).

To this day the State of Virginia insists on enforcing the archaic principle of "separate but equal" which has been totally rejected since *Brown* v. *Board of Education*, 347 U. S. 483 (1954). Indeed, the court below ruled that "separate but equal" is a living principle which has been limited in only a few specific instances. It believes that *Brown* "cannot support a claim for the intermarriage of the races or that such intermarriage is a right which must be made available to all on equal terms." *Loving* v. *Commonwealth*, 206 Va. 924, 926, 147 S. E. 2d 78, 80 (1966) (R-24). The Virginia Supreme Court of Appeals justified its decision on the basis of *Pace* v. *Alabama*, 106 U. S. 583 (1883); *Plessy* v. *Ferguson*, 193 U. S. 537 (1896); *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d 749, remanded 350 U. S. 891, aff'd 197 Va. 734, 90 S. E. 2d 849, appeal dismissed 350 U. S. 985 (1955).

Where an individual is denied a right permitted to others solely on the basis of race, the equal protection clause of the Fourteenth Amendment is violated. Though racially discriminatory laws withstood early legal tests on the ground that they applied equally to persons of both races, *Pace* v. *Alabama, supra,* that theory no longer applies:

> "In this situation, *Pace* v. *Alabama, supra,* is relied upon as controlling authority. In our view, however, *Pace* represents a limited view of the Equal Protection clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin* v. *Florida,* 379 U. S. 184, 188 (1964).

In *McLaughlin, supra,* this Court held Florida's racially discriminatory fornication statute unconstitutional. In a concurring opinion, Mr. Justice Stewart, joined by Mr. Justice Douglas, indicated that he would find any state criminal statute unconstitutional which "makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin, supra* at 198.

This Court has supported that view in numerous other cases. In *Dorsey* v. *State Athletic Commission,* 359 U. S. 533 (1959), the Court affirmed *per curiam* a lower court ruling [168 F. Supp. 149 (E. D. La. 1958)] that a Louisiana statute outlawing inter-racial boxing was a denial of equal protection. The statute theoretically applied to both white and Negro boxers. In *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (1948), a statute which denied commercial fishing licenses to aliens ineligible for citizenship was held unconstitutional. In terms pertinent to the case at bar, the Court held in *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942):

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

Any statute which bases the criminality of an act on race alone is a gross abuse of equal protection. As early as 1896, this Court said that criminal justice must be administered "without reference to considerations of race." *Gibson* v. *Mississippi*, 162 U. S. 565, 591 (1896). From *Buchanan* v. *Warley*, 245 U. S. 60 (1917) to *McLaughlin* v. *Florida*, 379 U. S. 184 (1964), the Court has repeatedly struck down laws imposing criminal penalties on the basis of race.

It is clearly unequal treatment and therefore a denial of equal protection to permit "white persons" to marry only "white persons," but to permit "colored persons" to marry anyone except "white persons." A person of Japanese ancestry, for example, is not included within the definition of "colored persons" [Va. Code § 1-14], or "white persons" [Va. Code § 20-54]. Thus the marriage of a Japanese person and a "white person" would be unlawful under Va. Code § 20-54 but not subject to criminal prosecution under Va. Code § 20-59, which punishes only marriages between "colored persons" and "white persons." A marriage between a Japanese person and a "colored person" would be neither unlawful nor subject to prosecution. Certainly this is not equal protection and the Virginia legislature, in passing an "Act for the Preservation of Racial Integrity," *supra*, was not concerned with the equal protection of the "integrity" of the Negro race. That being true,

the statutes are unconstitutional devices which stamp one group of citizens inferior. These statutes are relics of slavery which deny equality under the law. Cf. *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Goss* v. *Board of Education,* 373 U. S. 683 (1963); *Johnson* v. *Virginia,* 373 U. S. 61 (1963).

## II.

## Appellants were denied due process of law.

"If the right to marry is a fundamental right, then it must be conceded that an infringement of that right by means of a racial restriction is an unlawful infringement of one's liberty." *Perez* v. *Sharp,* 32 Cal. 2d 711; 198 P. 2d 17, 31 (1948) (*sub nom. Perez* v. *Lippold*). Appellants maintain that marriage is such a basic, fundamental and natural right and that the choice of a mate must be left to one's own desires and conscience. These desires cannot be infringed by the state setting standards which unreasonably and arbitrarily apply racial criteria. This principle is supported by *McLaughlin, supra* at 192.

> Our inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by the white person and a Negro, but not otherwise.

The traditional test for the reasonableness of a "police powers" statute is given in *Nebbia* v. *New York,* 291 U. S. 502, 525 (1934). "[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have

a real and substantial relation to the object sought to be attained."

Given the decisions by this Court in *Brown* v. *Board of Education, supra,* and its progeny, a statute which makes legal distinctions solely on the basis of race are presumptively unconstitutional. See e.g., *Hamm* v. *Virginia State Board of Elections,* 230 F. Supp. 156 (E. D. Va.), aff'd *per curiam* 379 U. S. 19 (1964); *Dorsey* v. *State Athletic Commission,* 359 U. S. 533 (1959); *Oyama* v. *California,* 332 U. S. 633 (1948); *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410 (1948); *Shelley* v. *Kraemer,* 334 U. S. 1 (1948).

It is now unquestionable that the sacraments of marriage are beyond the arbitrary grasp of the state. *Meyer* v. *Nebraska,* 262 U. S. 390 (1922); *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942). In *Meyer* this Court, speaking of liberty under the Fourteenth Amendment, said that "without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children. . . ."

The First and Ninth Amendments as applied to the states through the Fourteenth Amendment further guarantee an inherent right of freedom in marriage.

> [T]he First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" . . . [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the first

amendment is one. . . . *Griswold* v. *Connecticut*, 381 U. S. 479, 483-484 (1965).

To hold that a right so basic and fundamental and so deep rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments . . . or elsewhere in the Constitution would violate the Ninth Amendment. *Griswold, supra* at 491 (concurring opinion).

## III.

## The statutes involved violate 42 U. S. C. § 1981.

In addition to the equal protection rights individually denied to the appellant, Mildred Jeter Loving, she has been denied the civil rights guaranteed by § 1981 of Title 42 of the United States Code.

She has been denied the right "to make and enforce contracts" in the same manner as a white citizen. She has been denied "the full and equal benefit of all laws and proceedings" as is enjoyed by white citizens. Section 20-53 of the Virginia Code violates 42 U. S. C. § 1981 by denying to Mildred Jeter Loving, a "colored person," a license that would be granted to a "white person" applying to marry another "white person." Similarly, Richard Perry Loving has been denied the right to marry a "colored person," a license that would be granted to an Indian, an oriental, or any other person not white. Conviction by the State of Virginia under the challenged sections of the Virginia Code has subjected appellants to "punishments, pains, penalties and exactions" which would not have visited upon a "white person" marrying another "white person," or a "colored person" marrying another "colored person."

Mr. Justice White took notice of this in *McLaughlin, supra* at 192:

> We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure 'the full and equal benefit of all laws and proceedings for the security of persons and property' and to subject all persons 'to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' 42 U. S. C. § 1981 (1958), R. S. Sec. 1977.

## IV.

## The effects of the statutes.

The anti-miscegenation statutes deny appellants and numerous others similarly situated in Virginia and 17 other states many rights and benefits contingent upon the marital relationship. They are prohibited from establishing a family abode and raising their children in places where they and their family have often been long established and where many blood relatives still reside. Their children live under the stigma of bastardy. Victims of these statutes are prejudiced in their right to certain tax, insurance, social security, and workman's compensation benefits; to bequeath or inherit property; to certain criminal defenses, and other benefits and privileges too numerous to mention.

Under 42 U. S. C. § 416(h)(1) the determination of the eligibility of an applicant for Social Security benefits is governed by the ". . . devolution of intestate personal prop-

erty by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such individual is dead, by the courts of the State in which he was domiciled at the time of his death. . . ."

Under Va. Code § 64-7, "The issue of marriages deemed null in law or dissolved by a court shall nevertheless be legitimate." However, the offspring of miscegenous marriages are specifically excluded from the terms of this statute. *Greenhow* v. *James*, 80 Va. 636 (1885). Therefore, the children of miscegenous marriages are prejudiced from taking their rightful and deserved share of estates according to Virginia law of devolution of intestate property, and live under the stigma of bastardy.

Under Va. Code § 18.1-45, marriage to the victim is deemed a defense or factor in mitigation of punishment for statutory rape. The anti-miscegenation laws of Virginia prejudice Negroes and whites, as groups, from the benefits of this statute. Furthermore, there is no right not to testify against a spouse for persons subject to these statutes.

Under the anti-miscegenation statutes, appellants are precluded from sharing in benefits under workman's compensation, that are contingent upon a marital relationship. *Toler* v. *Oakwood Smokeless Coal Corp.*, 173 Va. 425, 4 S. E. 2d 364 (1939). The appellants, as individuals, and whites and Negroes, as groups, are also prejudiced from taking advantage of the benefits of joint income tax returns. Furthermore, appellants are also denied and prejudiced from taking advantage of the rights and benefits of private insurance and social welfare benefits that are contingent upon the marital relationship.

All persons who enter into miscegenous marriages and either live in *or move into* Virginia are similarly situated. (See *Calma* v. *Calma,* 203 Va. 880, 128 S. E. 2d 440 (1962).)

## CONCLUSION

**It is submitted that the decision of the Supreme Court of Appeals of Virginia erroneously upheld the constitutionality of the statutes involved; that the questions presented are so substantial as to require plenary consideration for their resolution, and upon consideration thereof the Court should reverse the judgment below.**

Respectfully submitted,

BERNARD S. COHEN
PHILIP J. HIRSCHKOP
LAINOF, COHEN & COHEN, ESQS.
1513 King Street
Alexandria, Virginia
*Attorneys for Appellants*

MELVIN L. WULF
156 Fifth Avenue
New York, New York

DAVID CARLINER
1424 16th Street, N.W.
Suite 501
Washington, D. C.

*Of Counsel*

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# APPENDIX